FILED
SEP 29 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 395

F. T. NEWTON AND MRS. F. T. NEWTON,
Petitioners,

vs.

FRANK S. GLENN, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondents respectfully represent and show to the court:

I

Objections to Sufficiency of Petition and Record for Writ of Certiorari

1. The petition does not conform to the requirements of Rule 38:

(a) In that under said rule a certiorari petition "shall be accompanied by a certified transcript of the record in the case." Only a part of the record has been filed in this court, there having been certified only the printed part of the rec-

ord which is substantially less than the whole record (R. 1-6).

(b) The petition does not conform to that part of said rule 38 which requires that "the petition shall contain a summary and a short statement of the matter involved"; and the supporting brief is not direct and concise.

(c) The petition does not assign "special and important reasons" for writ of certiorari as required by Rule 38 (5).

(d) There is total absence of conflict of decisions of the Circuit Court of Appeals with decisions of other like courts and no important question of Federal Law is involved, and this Court is not concerned with questions not presented in the trial court or to the Circuit Court of Appeals of the Fifth Circuit.

2. The supporting brief does not conform to Rule 27 of this court in that a concise statement of the grounds on which the jurisdiction of the court is invoked is not furnished and neither is there a concise statement of the case containing all that is material to the consideration of the awkwardly presented questions, and with no page references to the printed record.

3. Findings of fact concurred in by the trial court and the Circuit Court of Appeals will be accepted by the Supreme Court unless clear error is shown and no such error exists in this record. This "two-court rule" operated as well upon consideration of applications for certiorari as in the decision of cases upon the merits. The trial court and the Circuit Court of Appeals in this cause were in accord on all issues of law and the findings of fact. The petition for writ of certiorari should be denied.

> "The two courts below are in agreement as to the inferences fairly to be gathered from the facts, and their

findings are not to be disturbed unless clearly erroneous." *United States of America* v. *Commercial Credit Company*, 76 L. Ed. 978, 268 U. S. 63.

"Both courts below, after painstaking examination of the evidence, found there was such privity or knowledge and accordingly ruled that the claim for limitation must be denied. We accept this concurrent finding. There was sufficient evidence to support it." *Alexander, Administratrix, et al.* v. *Spencer Kellogg & Sons, Inc.*, 76 L. Ed. 903, 285 U. S. 502, 510.

"The Circuit Court of Appeals reexamined the findings in the light of the evidence and accepted them. It must be a strong case in which this court will set aside these concurrent findings of two courts. We think this is not such a case." *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company*, 88 L. Ed. 721, 321 U. S. 275, 278.

"Some of these findings have been challenged. But we do not stop to examine the evidence. We accept those findings, as they were concurred in by two courts and no clear error is shown." *Anderson* v. *Abbot, et al.*, 88 L. Ed. 793, 321 U. S. 349, 356.

II

Response Proper to Petition for Writ of Certiorari

The Acts of Congress Allegedly Involved

The questions allegedly involved in the petition for writ of certiorari have no application, as we view it, to the trial and judgment upheld by the Circuit Court of Appeals for the Fifth Circuit. As a preface to the identity of the questions presented, petitioners contend that the court set aside the jury verdict and entered judgment non obstante veredicto. However, the trial court only permitted the application of Rule 50(b) of Rules of Civil Procedure of District Courts of the United States. We shall deal with the questions in the order identified by petitioners and under identical

headings. Petitioners seek interpretation of (a) Title 40, Section 407, U. S. C. A., (b) Title 40, Section 270(a) and 270(b), U. S. C. A., (c) Title 11, Section 95, U. S. C. A., (d) Title 11, Section 21, U. S. C. A., and (e) Title 11, Section 42, U. S. C. A.

"History of the Case"

The petition under heading above mixes law and facts and erroneously pictures the existing record of facts and the law applicable thereto.

Petitioners were interested with F. S. Glenn in building of military reservations and housing projects prior to March 1st, 1943. Thereafter F. S. Glenn withdrew from the business, and with approximately twenty-three Government contracts scattered in six southern states there was failure to meet payrolls on October 16th, 1943 (R. 382). On November 3rd, 1943, the original petition in bankruptcy was filed with two intervening petitions filed by the same attorneys on November 5th and November 15th of 1943, and wherein there were involved the first and second Acts of Bankruptcy (R. 8-21). Subsequently a number of intervening petitions were filed down to February 5th, 1944, when an amended and intervening petition was filed after court approval was first had and obtained and which petition identified six creditors with claims aggregating approximately $100,000.00 (R. 89-98), and the order authorizing the amendment had approval of petitioners in words as follows:

> "The undersigned of attorneys of record for the parties identified as debtors hereby waive service of process and approve the foregoing form for order and agree to file their answer to the petition on or before ten days from this date.
>
> "Dated this fifth day of February, A. D., 1944.
>
> "T. J. Wills,
> Of Attorneys".

(The foregoing agreement to court order omitted by agreement from printed record. R. 100.)

The trial began on June 1st, 1944, and consumed more than three weeks and resulted in a printed record in three volumes with more than nineteen hundred pages and with a substantial part of the record omitted as disclosed through pages 1 to 6, inclusive, of record. Petitioners correctly state on pages 7 and 8 of their petition on file herein that there was included in their debts and obligations the $1,500,000.00 due the Union Planters Bank and Trust Company of Memphis, Tennessee, and $1,300,000.00 due the Maryland Casualty Company and the National Surety Corporation for monies paid to satisfy claims of labormen and materialmen (R. 1755 and 571-2). The $2,800,000.00 due and unpaid by petitioners did not include $150,000.00 stand-by payroll (R. 571-2), and it did not include approximately $150,000.00 of unpaid Federal taxes (R. 1131), and approximately $200,000.00 to common creditors in addition to the approximately $100,000.00 of unpaid claims represented by petitioning creditors in petition, aforesaid, of February 5th, 1944. The only available monies to cover this total indebtedness of more than $3,000,000.00 was the money to be received from the Government of the United States under several contracts and amounting to less than $1,007,000.00 (R. 572).

The only testimony in the record which would attempt to deal with solvency is that of the Dumain audit which does not attempt to show the status of the petitioners other than on August 31st, 1943, and he admitted that on bank balances alone the books showed approximately $800,000.00 more than petitioners actually possessed as of August 31st, 1943 (R. 1361-1374).

We invite this court to review the testimony for petitioners, which testimony includes refusal of both petitioners to testify on ground that their testimony "might tend to

incriminate'' them. Sixty pages of the record is made up of that kind of testimony (R. 1833-1872 and 1872-1890). They claimed payment of $40,000.00 as attorneys' fees (R. 608). They gave away all Government Bonds and life insurance (R. 601). They obtained $30,000.00 in cash from a brother-in-law after the default (R. 612). They moved their remaining property away in the night time and sold it to a friend for about $10,000.00 (R. 615). They deeded to their sister and sister-in-law $451,100.00 of property to satisfy an old debt of approximately $52,000.00 (R. 1133 and 1134). Testimony through a period of three weeks covered similar transactions where property was dissipated and at a time when petitioners admitted they had no property or money with which to pay their debts (R. 402 and 537). Justice and right required the result which is being attacked by petitioners.

Four Acts of Bankruptcy were pleaded with no new or novel applications of law and with questions of fact not denied and resolved in favor of respondents by the trial court and the Circuit Court of Appeals. On sustaining the motion for judgment under said Rule 50 (b) the trial judge gave forceful opinion in writing (R. 1655-58). The Circuit Court of Appeals for the Fifth Circuit reviewed the record and concluded against petitioners with announcement that, ''Viewing the evidence in the light most favorable to the appellants, and accepting as true all competent evidence in their behalf, we think the requested peremptory instruction to find for the plaintiffs should have been granted'' (R. 1917).

''Court Misinterprets Section 407, Title 40, U. S. C. A.''

The foregoing heading appears on page 10 of petition, but the law there identified has no application whatsoever. Paragraph 402 thereof states the purpose of the Act to be in part: ''Construction, repair, and improvement of pub-

lic highways and parkways, public buildings, and any publicly owned instrumentalities and facilities; conservation and development of natural resources," etc. Paragraph 401 thereof states in part: "After the expiration of two years after June 16, 1933, or soner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 701 of Title 15 has ended, the President shall not make any further loans," etc. And Paragraph 407, identified by petitioners, provides in part: "For the purpose of expediting the actual construction of public works contemplated" by the program "the President is authorized and empowered, through the Administrator" * * * "to approve any assignment executed by any such contractor, with the written consent of the surety or sureties upon the penal bond executed in connection with his contract, to any national or State bank, or his claim against the United States, or any part of such claim, under such contract," etc.

The foregoing Act must be dismissed from consideration because the projects here involved were let by the United States to these bankrupt contractors after 1940 and admittedly were a part of our preparation for war and the national defense as shown by the assignments to said bank about which there is not the slightest dispute. There was involved an Act not identified by petitioners, being the Assignment of Claims Act of 1940 appearing in 31 *United States Code Annotated*, paragraph 203. Prior to 1940 this statute provided that all assignments of any claim upon the United States "shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof," etc. This statute was passed in 1908 to protect the United States against con-

flicting claims arising under assignments and to absolutely prevent assignments until after the claim against the United States had been determined in amount and allowed.

With the approach of war, Congress, in 1940, amended the Act to make it possible for contractors doing work for the United States to assign "to a bank, trust company, or other financing institution" * * * "all amounts payable under such contract" so that contractors could be financed quickly and the nation prepared for the oncoming war. This Assignment of Claims Act of 1940 is the act under which the contractor executed to said bank the various assignments involved (R. 314). However, petitioners have not mentioned this act, but they have selected a totally unrelated act for discussion and requested the court's interpretation thereof.

Under said Assignment of Claims Act of 1940 and the contracts with the United States the contractor was entitled to progress payments at intervals equal to ninety percent of the value of the work done and materials delivered on the project. The assignee bank was under no obligation to lend the contractor unlimited amounts, but only such amounts as the bank felt it could safely lend. It was the conduct of the contractor, his inefficiency in management, the chaotic confusion of his affairs, books and records, the undisclosed and secretive conveyances made by him of all of his assets and other similar factors which caused an investigation and a refusal by the bank to make further loans (R. 1678-1823). The investigation made by the bank and others revealed all of the irregularities detailed in the record. It revealed that the liabilities of petitioners exceeded their assets by approximately $2,000,000.00 and it also revealed that the Newtons had reduced to cash their liquid assets and discontinued the use of banking institutions for the carrying on of their business;

and the contractor defaulted with the Government on October 16, 1943.

"The Proper Construction of the Miller Act, Title 40, U. S. C. A., Section 270(a)-270(b)"

The petitioners call for an interpretation of these statutes commonly known as the Miller Act. There is nothing complex about the statutes. They have been before the courts many times and have been construed so often that they are settled law. There are involved payment bonds. Under paragraph 270(a) Title 40, *United States Code Annotated,* it is provided that a bond or bonds shall be furnished where the contract with the United States exceeds $2,000.00. The bond protects "all persons supplying labor and material in the prosecution of the work provided for in said contract." Paragraph 270(b) of said law provides for a delay of ninety days after the last labor was performed or materials furnished before suit on the payment bond. In the matter in controversy few suits were filed, but the surety companies on the bonds paid in excess of $1,300,000.00 to labormen and materialmen.

"Who May File a Petition in Involuntary Bankruptcy"

It is true that the defendants on the trial moved the court for a directed verdict (R. 1143). However, that motion did not assert the apparent contention of the opposition that the petitioning creditors were protected by the Miller Act. In fact the Miller Act in most cases did not apply in favor of petitioning creditors. The amended petition of February 5th, 1944, of George A. Shaper and five others represented claims of approximately $100,000.00 and none of said petitioners were affected or protected by the Miller Act other than the Bailey Lumber Company with claim of approximately $1200.00. We fail to see or understand the application attempted to be made.

"The Court's Construction of Title 11, U. S. C. A., Section 21 Was Erroneous"

The First, Second, Third, and Fifth Acts of Bankruptcy were pleaded in the amended petition of February 5th, 1944, filed by George A. Shaper and others, and the Honorable T. J. Wills, of attorneys for petitioners, approved the order authorizing the amendment and consented to the filing thereof (R. 100). The original and amended petitions filed prior to February 5th, 1944, covered the First and Second Acts of Bankruptcy. The trial court and the Circuit Court of Appeals concluded that all four acts of bankruptcy applied against petitioners. The Circuit Court of Appeals said of this that, "The burden of proof was on the petitioning creditors; they met it by enough evidence of the insolvency of the defendants, of the appointment of a receiver to take charge of their property, and of transfers, conveyances, preferences, and concealments by them, to establish prima facie all the acts of bankruptcy charged in the amended and supplemental petitions. Substantial evidence in contradiction thereof, especially in contradiction of that evidence tending to show defendants' insolvency, was necessary to create an issue of fact for the jury. Such evidence was not produced, although the facts as to their solvency were peculiarly within the knowledge of the defendants" (R. 1917).

"Jury Trials"

Under the authority of Section 42 Title 11, *United States Code Annotated,* the petitioners as defendants requested trial by jury and the jury trial was afforded them. The case was submitted to the jury after the close of the evidence and after respondents had moved for a directed verdict in their favor, resulting in jury verdict for the defendants. Thereupon and under authority of Rule 50 (b) of the Federal Rules of Civil Procedure and within ten days

after verdict, respondents filed motion for judgment which was sustained. The trial court had concluded that the defendants had furnished no evidence to create a question of fact for determination by the jury and that the petitioners had furnished sufficient of testimony to establish all the acts of bankruptcy charged in the original and amended and supplemental petitions. The Circuit Court of Appeals for the Fifth Circuit held that when the evidence was viewed in its most favorable light to the bankrupts "the requested peremptory instruction to find for the plaintiffs should have been granted" (R. 1917). If the books of petitioners had not been out of balance $800,000.00 in their favor as to cash on hand in banks (R. 1361-74), and if petitioners had not owed more than $3,000,000.00 with only $1,000,000.00 of assets to come from the Government on contracts at a time when they had no money or other property or if petitioners had been able to furnish facts to show solvency or to answer simple questions without complaint that to answer may tend to incriminate them, a question of fact may have been created for the jury, but the petitioners have themselves wholly failed in every particular and no issues of fact appeared in the record for jury consideration.

The petition is difficult to answer because the major questions have to do with Federal Statutes not applying either directly or indirectly to the rights of the parties. The petitioners insist that a proper interpretation of the Federal Statutes identified require the result that (a) when the contractor executed the assignments to the bank, it became liable to the contractor for the full amount of the project contract price, and that the bank was then obligated to pay to the contractor regardless of the extent of the progress with the project; and (b) upon the execution of the assignment by the contractor to said bank the United States immediately became indebted to the bank for a like

amount which the United States was obligated to pay; and (c) the bonding companies which executed the performance and payment bonds were obligated to pay all the contractor's debts to sub-contractors and labormen and materialmen in addition to performance of the project contract and without any exposure to the contractors because of default or failure. The substance of the argument is that when the contractor defaulted, the bonding companies were obligated to pay approximately $1,300,000.00 to labormen and materialmen, and the United States was obligated to pay $1,500,000.00 to the bank and the contractor would not have any exposure because of said payments and would not be liable therefor and solvency would thereby be established. In view of all of the above respondents seek a denial of the petition at the cost of petitioners.

III

Argument for Respondents

Section 407 Title 40, United States Code Annotated

The opposition correctly quotes the law above identified which became effective on June 16th, 1933. However, as pointed out in our answer to petition this act related to the Federal Emergency of 1933; and the projects here involved were let by the United States to these bankrupt contractors after 1940 and admittedly were a part of the national defense program. We, therefore, are at a loss to understand why petitioners and their counsel inject into the discussion the Act of 1933 dealing with the depression of those years and the assignments permissible under that Act. As pointed out in response to petition, the Assignment of Claims Act appearing as paragraph 203, Title 31, *United States Code Annotated* was the basis and controlling law for the assignments here involved (R. 314). This Assignment of Claims

Act of 1940 has been construed by the courts, including the Circuit Court of Appeals for the Fifth Circuit, and this court.

> "Section 203, supra, prior to its amendment on October 9, 1940, provided that all assignments of any claim against the United States of the nature here involved should be absolutely null and void unless, along with numerous other requirements, the assignment of such claim was made after such claim had been allowed, the amount due ascertained, and a warrant for the payment thereof issued. The amendment of October 9, 1940, as counsel for both sides admitted in oral argument, was made for the purpose of aiding contractors in financing national defense contracts. The amendment eliminated the provisions against assignments in any case in which the monies due or to become due from the United States, or from any agency or department thereof, aggregating $1,000.00 or more were assigned to 'a bank, trust company, or other financing institution, including any Federal lending agency', but requiring, in the event of any such assignment, that the assignee thereof should file written notice of the assignment, together with a true copy of the instrument of assignment." * * *
>
> "In addition to protecting the Government, which was the prime purpose of the section before its amendment, as construed in *Martin* v. *National Surety Co.* 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822, the amendment of 1940 had the incidental effect of protecting that assignee who filed his assignment and gave notice under the provisions of the statute." *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company,* 149 Fed. 2nd 73 (May 17, 1945, 5C).

"The Miller Act"

It is agreed by all that the contracts of the petitioners were covered by performance and payment bonds required under paragraphs 270(a) and (b), Title 40, *United States Code Annotated.* It is not true that the petitioning creditors were not common or unsecured creditors. Some of the peti-

tioning creditors received some or all of their money from the surety companies, but most of the creditors, as shown by the testimony, were common or unsecured creditors and have not yet been paid. At the time of the trial it was agreed that the claim of the Gulf States Creosoting Company was in the sum of $218.19 and of the American Sand and Gravel Company of $565.08 (R. 180), and of Contractor Material Company in the sum of $830.08 and $166.64 (R. 181), and of the Hermitage Portland Cement Company in the sum of $602.50 (R. 215), and of Bailey Lumber Company in the sum of $1,205.61 (R. 216), and of Brick & Tile Company in the sum of $430.00 (R. 217), and of the Massachusetts Bonding and Insurance Company in the sum of $3,674.07 (R. 217), and of Associated Indemnity Corporation in the sum of $5,343.39 (R. 1831). There was no substantial dispute as to amounts of claims of any of the petitioning creditors.

"Who May File a Petition in Involuntary Bankruptcy"

The Bankruptcy Act through Section 95, Title 11, *United States Code Annotated* sets out who may file such a petition. Where the creditors are more than twelve, three or more creditors who have provable claims amounting to $500.00 or over may file a petition. In this case there were eight petitioners who had claims aggregating more than $13,000.00 as hereinbefore set forth. The last of these claims above listed where agreement was had is that of the Associated Indemnity Corporation and after naming the amount, it was stipulated and agreed that the "indebtedness was past due and owing prior to and at the time of the filing of the petition in bankruptcy, and remains unpaid" (R. 1831). Similar agreements were had respecting other claims of petitioning creditors. There is no foundation for the statement that the petition should have been dismissed because the claims of petitioning creditors were not provable debts.

Paragraph 95 (f) of said Title 11 provides that "Creditors other than the original petitioners may at any time enter their appearance and join in the petition."

> "Under Bankruptcy Act * * * an intervening petitioner may be counted to make up number of creditors to support involuntary petition." Syllabi 2, *Seifred vs. Firestone Tire and Rubber Company, et al.*, (C. C. A. 1st Circuit) 4 Fed. 2d. 305.

"Amendments Were Improperly Allowed"

The amendment about which complaint is now made is that of February 5th, 1944 (R. 89-99). Court approval for the filing of said amendment was entered and based upon an approval of said order which was made a part thereof. The order appears at pages 99 and 100 of the record. The agreement was not copied into the printed record, but it has been furnished above just as it appears in the original record at page 194. Item 14 on page 2 of this record shows that the waiver of defendants was omitted from the printed record; but the attorneys of record for the defendants approved the form for order and agreed to answer the petition in ten days without process being issued or served. That amendment covered Acts 1 and 2 of Bankruptcy just as covered in the original petition and in all previous amendments. Even if the attorney for the defendants had not agreed to the amendment, it all becomes a moot question since the adjudication must be had on either or both of the First two Acts of Bankruptcy. In the early history of the bankruptcy law of the United States a Federal District Court held that a good objection had existed, but that the objection was made too late to take advantage thereof. *In Re Cliffe*, 94 Fed. 354. If there existed some irregularity in the amendment of February 5th, 1944, it was waived when the attorney agreed to the court order authorizing the amendment and approved the same and thereafter filed answer thereto and in the

answer raised no objections to the amendment and sought a jury trial thereon (R. 103-109). The amendments were allowed with the approval of the defendants and on order of the court and no objections were made thereto in the subsequent pleadings, and the late objections thereto only tend to confuse and constitute basis for delay.

We deny that the defendants' insolvency must be of the date of the acts alleged. It was on October 16th, 1943, when Newton defaulted with the Government. He created no debts after that date, according to his own testimony, and at that time he owed the bank or banks $1,500,000.00 and when the surety companies got through paying for labor and materials he had placed on the jobs prior to that time, he owed them $1,300,000.00. None of the petitioning creditors or other creditors asserting claims against the defendants made sales to them after October 16th, 1943. It is true that the surety companies did not know exactly what they would have to pay as of October 16th, 1943, when the Newtons defaulted with the Government, but claims were asserted and proved and paid in the amount aforesaid. In view of the fact that the original and amended petitions down to February 5th, 1944, all involved the First and Second Acts of Bankruptcy and since the amendment of February 5th, 1944, was filed with consent of the defendants and answered without process and objections, said amendments were entirely proper and so considered by the trial court and the Circuit Court of Appeals.

Petitioners are in error in claiming that the defendants' insolvency must be as of the date of the acts alleged. They identify the cases of *In Re Ross & O'Brian Iron Works,* 58 Fed. 2d, 961; *In re Utrecht Coal Co.,* 63 Fed. 2d. 745, and *Starfred Properties* v. *Ettinger,* 131 Fed. 2d. 575, in support of this contention. The first case mentioned was decided by the Circuit Court of Appeals for the Second Cir-

cuit in 1932 and involved only alleged preferential transfers. The second case arose with the same Circuit as did the third case mentioned and involved the same subject matter. Under paragraph 21, Title 11, *United States Code Annotated*, as amended, and under paragraph (b) of said amendment it is provided that, "For the purposes of this section, it is sufficient if intent under the first act of bankruptcy or if intent or insolvency under the second act of bankruptcy exists either at the time when the transfer was made or at the time when it became perfected, as hereinabove provided." In this connection it must be remembered that the first act of bankruptcy does not depend upon insolvency and insolvency does not have to be pleaded or proven. The only time when a date becomes important under the First Act of Bankruptcy is when the defendant seeks to plead and prove solvency as of the time of the filing of the petition against him. The Federal Statute on this phase of the matter is as follows:

> "It shall be a complete defense to any proceedings under the first act of bankruptcy to allege and prove that the party proceeded against was not insolvent as defined in this title at the time of the filing of the petition against him. If solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed. In such proceedings the burden of proving solvency shall be on the alleged bankrupt." Paragraph C, Section 21, Title 11, *United States Code Annotated.*

The fraudulent conveyances were dated August 23rd, 1943. They were recorded October 6th, 1943, and as of that date under the Mississippi law became perfected as between the parties and the original petition in bankruptcy was filed on November 3rd, 1943. The material dates as to the first and second acts of bankruptcy are the three dates last above mentioned. The amendment of February 5th, 1944,

brought in the date of December 6th, 1943, as applied to the first and second acts of bankruptcy because it was on December 6th, 1943, when the remainder of the property of petitioners was conveyed away to their General manager, J. B. deVillentroy (R. 1656). The bankruptcy court is a court of equity, and the court may consolidate voluntary and involuntary petitions for trial. *International Silver Company, et al.* v. *New York Jewelry Co., et al.*, C. C. A. 6th Cir., 233 Fed. 945.

The amendment now complained of was authorized by agreed court order and was answered, as aforesaid, without objections thereto. Even if the amendment might have been objectionable the conduct constituted waiver. *Leidigh Garage Company, et al.* v. *Stengel, et al.*, 95 Fed. 637, C. C. A. 6th Cir.; *Chicago Motor Vehicle Company* v. *American Oak Leather Company, et al.*, C. C. A. 7th Cir., 141 Fed. 518.

"Jury Verdict Set Aside"

The petitioners closed their argument with statement that the bank had advanced $3,823,239.02 less than the total contract values between petitioners and the Government. They recognized the debt due the bank of $1,500,000.00 and then they state that the Dumain audit showed a net worth of $289,000.00 and indicate that this would create a question of fact for the jury. The fallacy of this argument as recognized by the trial court and the Circuit Court of Appeals is that the Dumain audit was made to show net worth as of August 31st, 1943, at a time when the books could not be relied upon, according to Dumain, and at a time when the books showed that petitioners had $800,000.00 in the several banks more than they actually possessed (R. 1361-74). The Dumain audit had no probative value. Petitioners admitted that they had no money and did not know where they stood. They simply failed to furnish testimony in contradiction of the prima facie

case made against them. The trial court and Circuit Court of Appeals had no election but to require adjudication in bankruptcy. Under Section 42, Title 11, *United States Code Annotated*, petitioners were entitled to a trial by jury; but petitioners failed to create issues of fact for determination. The same rules for direction of verdict apply in bankruptcy cases as in other cases involving jury trials. *In Re Ironclad Manufacturing Company*, 197 Fed. 280, C. C. A. 2nd Cir.

Conclusion

The trial court and the Circuit Court of Appeals have committed no error. The Circuit Court of Appeals has not decided "an important question of local law in a way probably in conflict with applicable local decisions;" and it has not decided "an important question of Federal law which has not been, but should be settled by this court." We submit that the petition for writ of certiorari is not well taken and should be denied.

Respectfully submitted,

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